U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

B4

MAY 06 2005

[redacted]

FILE: WAC 03 078 52814 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in January 2000. The petitioner imports, manufactures, and distributes wholesale jewelry products. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner asserts that the evidence submitted establishes by a preponderance of the evidence that a qualifying relationship exists.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established a qualifying relationship between the petitioner and the foreign entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner avers that it is a 100 percent owned subsidiary of Diasqua (HK), and that Diasqua (HK) is a branch division of Diasqua International Ltd, solely owned by [redacted]. The petitioner provided its stock certificate number one issued to Diasqua (HK) in the amount of 100,000 shares on January 8, 2000. The petitioner's stock ledger corroborated that the petitioner had issued 100,000 shares to Diasqua (HK) and showed that $50,000 had been paid for the shares. The petitioner also provided its 2001 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for the period beginning April 1, 2001 through March 31, 2002. The 2001 IRS Form 1120, Schedule L, Line 22(b) showed the petitioner's common stock was valued at $100.

On June 2, 2003, the director requested: (1) evidence that the foreign parent company had, in fact, paid for its purported interest in the U.S. entity, including original wire transfers from the parent company to the petitioner; (2) the petitioner's bank statements corroborating the transfer of funds; (3) a copy of the petitioner's California Notice of Transaction Pursuant to Corporations showing the total offering amounts; (4) a copy of the minutes of the meeting that listed the stock, shareholders, and the number and percentage of shares owned; and, (5) the petitioner's stock ledger showing all certificates issued to the present date.

In an August 20, 2003 response, counsel for the petitioner explained that a wire transfer was not available because the petitioner had been capitalized with tangible property rather than by wire transfer. Counsel

indicated that the foreign entity had transferred $50,000 in diamond jewelry to the petitioner via Pretty Jewelry, Inc. of New York, another component of the jewelry companies owned by [redacted] Counsel asserted that the petitioner had credited $50,000 to its capital account in exchange for issuing 100,000 shares of stock to Diasqua (HK). In support of this explanation counsel provided: (1) [redacted] affidavit explaining this form of capitalization; (2) a copy of an invoice from Pretty Jewelry, Inc. to the petitioner billing the petitioner for the transfer of jewelry valued at $132,149; (3) several invoices from Diasqua (HK) to Diasqua, Inc. dated in November and December 1999 to evidence the transfer of diamond jewelry valued at more than $50,000; and, (4) copies of the petitioner's February and March 2000 bank statements to evidence cash received from the sale of petitioner's inventory.

The director observed that the petitioner's stock ledger showed that the petitioner had issued stock in exchange for $50,000. The director noted, however, that the petitioner's IRS Forms 1120, on Schedule L, Line 22(b) showed that the value of the petitioner's common stock was $100. The director determined that this inconsistency had not been resolved and that the petitioner had not provided unerring and concise evidence to substantiate the claim of qualifying foreign company ownership of the petitioner.

On appeal, counsel for the petitioner acknowledges that the petitioner's IRS Forms 1120 contained erroneous information regarding the amount of the petitioner's capitalization. Counsel provides amended tax returns bearing an IRS receipt stamp to show the returns had been filed. The amended returns show the capital amount as $50,000. Counsel asserts that the error in the petitioner's tax returns is immaterial as the amount of capitalization, whether $100 or $50,000 is not inconsistent with Diasqua (HK) 100 percent ownership of the petitioner. Counsel also offers a statement written by a corporate attorney as expert testimony on the petitioner's ownership. The attorney indicates that a review of the evidence, including the petitioner's tax returns, does not reveal evidence that contradicts the petitioner's claim regarding its ownership. Counsel also contends that the director misunderstands the correct standard of proof applicable to adjudicating petitions, and that the petitioner must establish eligibility by a preponderance of the evidence, not clear and convincing evidence or evidence beyond a reasonable doubt.

Counsel correctly observes that the petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

In this matter, in addition to the inconsistency noted by the director and resolved on appeal, the record contains disparate and unsubstantiated evidence regarding the ownership of "Pretty Jewelry" and the in kind transfer of jewelry to capitalize the petitioner. The petitioner has supplied evidence that Pretty Jewelry, Inc. has billed the petitioner for the transfer of jewelry valued at $132,149 and that a separate company, Diasqua, Inc. had been billed by the foreign entity for the transfer of jewelry. The petitioner also provided the affidavit of [redacted] stating that he had "directed that excess of $100,000 in jewelry be transferred from Diasqua (HK) to the United States via 'Pretty Jewelry, Inc.,' another jewelry business that I own in New York City."

The record does not contain substantiating evidence of the ownership of Pretty Jewelry, Inc. or Diasqua, Inc. or their relationship to each other, or the purported foreign parent company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In this matter, this evidence is especially relevant to substantiate the information in Mr [redacted] affidavit that the petitioner was actually capitalized by the foreign entity, and not just conducting transactions in the normal course of business. Moreover, the record lacks customs documentation showing the value, classification, and rate of duty for the imported goods, which would provide independent verification that goods were imported into the United States by the foreign entity. The AAO notes that although customs brokers or agents are frequently utilized in the import process, the ultimate consignee should have access to these forms since they are liable for all import duties and taxes.

The AAO acknowledges that an organization may be capitalized with in kind goods. However, establishing that in kind capitalization was used may require more than invoices and a statement of an interested party. In this matter, the petitioner has not provided sufficient substantive evidence to demonstrate a qualifying relationship with the beneficiary's foreign employer. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary will be primarily employed in a managerial or executive capacity for the United States entity. The petitioner initially provided a non-specific description of the beneficiary's duties borrowing liberally from phrases contained in the definitions of managerial and executive capacity. *See* 101(a)(44)(A) (ii) and (iii) and 101(a)(44)(B)(ii) and (iii) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner's organizational chart depicted the beneficiary as president. The chart also showed a secretary/administrative assistant and a sales manager directly under the beneficiary's supervision. The chart placed the sales manager in an intermediate tier between the beneficiary and four sales representatives. The sales manager's responsibilities included marketing and sales matters; the four sales representatives' duties including handling phone orders and selling jewelry wholesale and in showrooms.

In response to the director's request for additional evidence, the petitioner provided a description of the beneficiary's duties that although lengthy continued to contain generalities. For example, the petitioner indicated that the beneficiary as president served as the highest-ranking official, set corporate policy, held ultimate responsibility for personnel decisions, and oversaw all business activities of the company. This description is vague and does not convey an understanding of the beneficiary's actual daily duties. The petitioner also indicated that the beneficiary selected the petitioner's accountants, legal professionals, banks, collection agency, the office site, communicated with the purported parent company in Hong Kong, and coordinated and met with other subsidiaries on marketing progress and to ensure accurate feedback to Hong Kong regarding sales. These duties do not appear to evidence the beneficiary's ongoing daily activities. The petitioner also noted that the beneficiary directed the Los Angeles sales office, overseeing the sales manager to whom the president had delegated authority to oversee the sales representatives, ensuring that the sales

manager provided training and constant close supervision, approving promotional programs, ensuring inventory, and participating in national trade shows with officials from the parent company. These duties are typical of an employee providing supervisory and operational services to the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner's organizational chart, submitted in response to the director's request for evidence, again depicted seven positions within the organizational hierarchy. The petitioner, however, changed the sales manager's duties to overseeing the four sales representatives and accompanying them on large transactions for insurance purposes. First, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Second, the petitioner may not create artificial tiers of employees to suggest that an organization is sufficiently complex to support an executive or manager; instead the petitioner must substantiate that the duties of a beneficiary's subordinates correspond to their placement in an organization's structural hierarchy. Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business, when examining the managerial or executive capacity of a beneficiary. In this matter, the initial iteration of the sales manager's duties did not describe an individual primarily supervising the sales representatives. The record suggests that the second iteration of the sales manager's duties has been expanded to resemble an individual with some supervisory duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the description of the beneficiary's duties indicates that the beneficiary is the individual actually approving promotional programs, ensuring inventory, and participating in trade shows with officials from the parent company. Again these duties are more indicative of an individual providing operational and sales services. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N at 604. Furthermore, an individual whose duties encompass the duties of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. The petitioner has not submitted sufficient evidence to establish that the beneficiary's subordinates hold professional positions. As observed above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N 190. Neither does the record demonstrate that the beneficiary's duties have been or would be to primarily supervise managers or supervisors. The petitioner has not established that the beneficiary's employment will be primarily managerial or executive. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.